IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 442.

SCHWEGMANN BROTHERS, *et al.*,
Petitioners,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443.

SCHWEGMANN BROTHERS, *et al.*,
Petitioners,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS AND BUREAU OF EDUCATION ON FAIR TRADE, INC., *AMICI CURIAE.*

SAMUEL I. ROSENMAN,
Attorney for Amici Curiae.

SAMUEL I. ROSENMAN,
GODFREY GOLDMARK,
HERMAN S. WALLER,
ROBERT LOWENSTEIN,
of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

Table of Authorities.

Cases.

Statutes.

Legislative Materials.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 442.

SCHWEGMANN BROTHERS, *et al.*,

Petitioners,

versus

CALVERT DISTILLERS CORPORATION,

Respondent,

and

No. 443.

SCHWEGMANN BROTHERS, *et al.*,

Petitioners,

versus

SEAGRAM-DISTILLERS CORPORATION,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS AND BUREAU OF EDUCATION ON FAIR TRADE, INC., *AMICI CURIAE.*

Opinion Below.

The opinion of the United States Court of Appeals, 5th Cir. (Seagram, R. 96, *et seq.*; Calvert, R. 102, *et seq.*) is reported in 184 F. (2d) 11.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Statutes Involved.

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, Sec. 1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (Act 13 of 1936, La. R. S. 51:391-396).

These statutes are set forth in the Appendix.

Question Presented.

The question presented is this: Where a manufacturer has an agreement with a retailer establishing a minimum selling price for the manufacturer's product pursuant to the Louisiana Fair Trade Act and the Miller-Tydings Amendment, and a retailer who has signed no such contract has sold the product at less than such minimum price, will such manufacturer be denied injunctive relief because despite said two acts, the granting of relief would be in violation of Section 1 of the Sherman Law?

The Interest of *Amici Curiae*.

The National Association of Retail Druggists has an active membership of thirty-five thousand independent retail druggists and, with the affiliate membership consisting of state and county groups, represents an aggregate number

of fifty-two thousand independent retail drug store owners in the United States.

The Bureau of Education on Fair Trade is a non-profit organization, established under the auspices of The National Association of Retail Druggists, and administered by a committee comprised of representatives of manufacturers, wholesale distributors, and independent and chain store retailers of nationally advertised trade-marked products. Its purpose is to develop public understanding of Fair Trade.

Statement of Salient Facts.

Both respondents sell trade-marked brands of whiskeys and gins to wholesalers in the State of Louisiana, who, in turn, sell them to local retailers in that state for re-sale to the consuming public. Respondents do not sell directly to retailers. The petitioners, residents of Louisiana, are members of a commercial partnership operating a supermarket in New Orleans, where they sell liquor at retail.

Pursuant to the Louisiana Fair Trade Act, respondents separately and independently entered into contracts with numerous retail liquor dealers in Louisiana, which provide minimum prices for the resale of respondents' branded commodities at retail. Petitioners were duly notified, pursuant to the provisions of the Louisiana Act, of the prices established by the contracts just referred to. Despite such notification, petitioners wilfully and knowingly sold, at retail, to the consuming public, commodities bearing the trademark of respondents, at prices below the minimum retail prices established by the respondents.

The District Court enjoined such further sales, and its decree was affirmed in the Court of Appeals.

Summary of Argument.

The argument is summarized in the following points:

POINT I.

All that was required to make all of the provisions of the State Acts enforceable was an Act of Congress exempting the contract between the manufacturer and retailer from the provisions of the Sherman Law.

POINT II.

If it be assumed, contrary to the reasoning set forth in Point I, that it was necessary for Congress to exempt the "non-signer" provisions of the State statute from the provisions of the Sherman law, the legislative history and underlying purpose of the Miller-Tydings amendment establish that such amendment must be construed to have effected such exemption.

The State of the Law Prior to the Miller-Tydings Act and the Need for Federal Legislation to Make the State Fair Trade Acts Effective.

The state of the law prior to the enactment of the Miller-Tydings Act was such that it was deemed desirable to remove any doubts as to whether the state fair trade acts, all of which contain the non-signer provision, would be enforceable in the light of the provisions of the Sherman Act as interpreted by this Court.

Before pointing out the state legislation which preceded the Miller-Tydings Act, and the reasons which were

stated for its enactment, it may be helpful to indicate very briefly the state of the law as to the legality of resale price maintenance contracts under the Sherman Law and prior thereto.

Prior to the Sherman Law resale price maintenance of identified goods by "vertical" agreement among producers, vendees and sub-vendees, was generally recognized as valid. *Fowle* v. *Park*, 131 U. S. 88.

Even after the adoption of the Sherman Law, many lower Federal courts held that such arrangements were valid. See *Old Dearborn Distributing Co.* v. *Seagram Co.*, 299 U. S. 183, 188. However, in a series of decisions beginning in 1908, this Court held that the establishing of minimum resale prices by vertical agreement was an unreasonable restraint of trade under the Sherman Act (e.g., *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373), and an unfair method of competition within the meaning of Sec. 5 of the Federal Trade Commission Act (38 Stat. 719). *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441.

The decisions in *Dr. Miles* and similar cases were not the uniform views of this Court, because Mr. Justice Holmes and Mr. Justice Brandeis vigorously dissented from rulings which held vertical resale price maintenance by producers unlawful under Federal law. See dissenting opinion of Mr. Justice Holmes in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 409 and of Mr. Justice Holmes, Mr. Justice Brandeis concurring, in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 456. See, also, the article by Mr. Justice Brandeis prior to his becoming a member of this Court in *Harper's Weekly*, Nov. 15, 1913, entitled *"Cut-Throat Prices. The Competition That Kills"*.

In 1931, the first fair trade statute was adopted in California.* This statute was ineffective because it contained no "non-signer" clause (Federal Trade Commission, *Report on Resale Price Maintenance* (1945) pp. 67-8) and it was amended in 1933** by the addition of such clause. From that time until this Court's decisions in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corporation*, 299 U. S. 183, and *Pep Boys* v. *Pyroil Sales Co.*, 299 U. S. 198, on December 7, 1936, eleven other States enacted fair trade acts. Those cases held that state statutes substantially the same as that here involved did not violate the "due process" or "equal protection" clauses of the Federal Constitution.

At the time of the enactment by Congress of the Miller-Tydings Act in August 1937, 42 states had enacted fair trade acts similar to the act here involved.

The Committee reports in Congress show that there was doubt after the decision of this Court in the *Old Dearborn* case as to whether the state fair trade acts violated the Sherman law.

The House Judiciary Committee,† in reporting on H. R. 1611, the January 1937 Bill, stated in House Report No. 382, 75th Congress, 1st Session, page 2:

---

* Cal. Laws 1931, c. 278.

** Cal. Laws 1933, c. 260.

† In January 1937, shortly after the decision in the *Old Dearborn* case, Representative Miller and Senator Tydings introduced virtually identical bills from which the Miller-Tydings Amendment was derived (H. R. 1611 and S. 100, 75th Cong., 1st Sess.). Committees of the Senate and the House reported favorably on both these bills but they were not voted upon (House Rep. No. 382; Senate Rep. No. 257).

In June 1937, the House passed an appropriation bill for the District of Columbia (H. R. 7472, 75th Cong. 1st Sess.). When the appropriations bill came to the Senate, the Committee on the District of Columbia added thereto a rider which was substantially the same as the independent Miller and Tydings bills introduced

"In view of the decision of the Supreme Court, in *Dr. Miles Medical Company v. Park & Sons Co.* (220 U. S. 373), and other cases, it is doubtful, at least, that such contracts are now valid in interstate commerce."

So, too, the report of the Senate Committee on the Judiciary on S. 100 (the companion bill to H. R. 1611), which was incorporated by the Senate Committee on the District of Columbia in its report on the District of Columbia Appropriations Bill (H. R. 7472), expressed doubt as to whether the Sherman Act would make the local fair trade acts unenforcible. This Senate Committee report said (Senate Report 257, 75th Cong., 1st Sess., page 2):

"Though there is no specific adjudication on the subject, it is believed that contracts stipulating minimum resale prices, even when they are made or are to be performed in a State where such contracts are lawful, may violate the Sherman Act whenever the goods sold under the contract move in interstate commerce.

"Consequently, many manufacturers not domiciled in the State of the vendee are unwilling to run the risk of violating the Federal law, and the effectiveness of the State fair-trade laws is thereby seriously impaired.

"S. 100 removes the doubt as to the applicability of the Sherman Act by expressly legalizing such contracts where legal under the laws of the State where made or where they are to be performed."

---

in January (Senate Rep. No. 879). That rider (with an amendment added on the Senate floor expressly making it inapplicable to "horizontal combinations") was accepted by both Houses of Congress and was enacted as a part of the District of Columbia appropriation bill. So much of that bill as amended Section 1 of the Sherman Law is generally referred to as the Miller-Tydings Amendment.

A fuller statement of the legislative history of the Amendment appears in Judge Borah's opinion in *Pepsodent Co.* v. *Krauss Co.*, 56 F. Supp. 922.

The foregoing quotations from the committee reports indicate the existing doubt as to the impact of the Sherman Law on the state fair trade acts, despite the decision in the *Old Dearborn* case. Accordingly, Congress in August 1937 in order to effectuate the validity and enforcement of state fair trade contracts and remove possible conflict of such state acts with the Sherman Act, enacted the Miller-Tydings Act to amend Section 1 of the Sherman Anti-Trust Act.

POINT I.

All that was required to make all of the provisions of the State Acts enforceable was an Act of Congress exempting the contract between the manufacturer and retailer from the provisions of the Sherman Law.

If the Miller-Tydings Amendment be construed as narrowly as the petitioners contend, then, nevertheless, it appears that the exemption of the contract between manufacturer and retailer from the provisions of the Sherman Act was all that was necessary to make the state fair trade acts wholly effective. Only one question possibly may have been left open by the decisions of this Court in the *Old Dearborn* and *Pep Boys* cases, decided before the enactment of the Miller-Tydings Amendment. That was whether the *initial step* required under the plan of the state acts, to wit, the contract between manufacturer and retailer establishing a minimum resale price, was a violation of the Sherman Law.

The non-signer who sells to the consumer at less than the minimum price established is not a party to (in the language of the Sherman Law) any "contract", "combination" or "conspiracy". The cause of action of the re-

spondents, while predicated upon the existence of a contract which is now legal because exempted from the Sherman law, is one created by the state in section 2 of the Louisiana Act through the valid exercise of the state's police power, as expressly upheld in the *Old Dearborn* case. That cause of action is in tort for unfair competition.

The foregoing analysis of the basis of the respondent's cause of action is clearly stated in *Miles Laboratories* v. *Seignious*, 30 F. Supp. 549 (E. D., S. C.). In that case injunctive relief was sought against a non-signer under a South Carolina statute identical with the Louisiana statute. The attack upon the statute was, among other reasons, based upon the due process clause of the State Constitution. The Court discusses the *Old Dearborn* case, and then makes the following statement with respect to the basis of the right of the plaintiff at pages 555 and 556:

> "The attack under the due process clause (Article 1, Section 5) has been abandoned by the defendant. The original contention was that there was a violation of this clause because the statutes made the contracts signed by the plaintiff with third parties applicable to the defendant who had not signed any such contract. *Clearly this was an erroneous assumption, because it is not under the contracts that the plaintiff asserts the right to protect its products from price-cutting, but it is under the statute. It is seeking to enforce a statutory right, and not a contract right. The contracts made with third parties merely establish a minimum price, and no other term of such a contract is applicable to a person who has not signed it. The minimum price so established is applicable to all persons whom the statute, in its statewide application, can reach.*"*

---

* Emphasis throughout is supplied.

While the foregoing statement was made with respect to the application of the due process clause, it is equally applicable to the question here presented in that it clearly shows the source of the rights of the respondents here.

The brief *amicus* filed by the Solicitor General in support of the petition for *certiorari* in the instant case states (p. 3):

> "A state may not 'give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' *Parker* v. *Brown*, 317 U. S. 341, 351."

The case at bar is not one where the state has purported to grant any "immunity to those who violate the Sherman Act." The only "contract", "combination" or "conspiracy" in the case at bar is expressly exempted by the Miller-Tydings amendment. All that remains, of which petitioners complain, is the imposition on them of a statutory liability for unfair competition. This liability (i. e., as expressed in the decree of the District Court below) is solely the product of the state's exercise of its police power, and is a state action to which the Sherman Act does not apply. See *Parker* v. *Brown*, 317 U. S. 341, 352.

It appears therefore that the cause of action asserted against the petitioners is in no wise affected by the provisions of the Sherman law, but, on the contrary, is predicated on the existence of a valid contract between producer and retailer which the State Act uses as the means for the valid exercise of its police power. As stated in the majority opinion below (184 F. 2d at p. 15):

> "In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a federal act relieving price maintenance contracts from the prohi-

bitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states."*

Apparently the dissenting opinion below reaches the conclusion that an injunction should not have issued for the following reason (184 F. 2d at p. 17):

> "It is not material whether the defense be declared predicated upon the lack of State power, or upon the ground that the enforcement of a State statute will result in a Federal Court of Equity basing the exercise of its injunctive power upon grounds which are illegal because of the Sherman Act. The result properly to be reached is the same, for the Federal Court must not require action which

---

* The question presented in this case was also decided adversely to the petitioners' contention by the New York Court of Appeals in *Calamia* v. *Goldsmith Bros. Inc.*, 299 N. Y. 636 (1949). There the Court of Appeals affirmed a judgment for the plaintiff which granted an injunction against a non-signer. The appellant had argued that the Miller-Tydings Amendment "did not give any right of action against such non-signatories." The Court affirmed the decision below without opinion. Upon motion made to amend the remittitur (299 N. Y. 795) to the court below, the Court of Appeals amended its remittitur by adding the following:

> "'The following question under the Constitution and laws of the United States was presented and necessarily passed upon: "Whether Article 24-A of the General Business Law is inconsistent with the Miller-Tydings Amendment to the Sherman Act (U. S. Code, tit. 15, § 1) if construed to permit suits by non-signatories and against non-signatories of 'fair trade' contracts relating to commodities in interstate commerce". This Court held such construction of Article 24-A of the General Business Law of New York to be consistent with the Constitution and laws of the United States.'"

Despite this amendment, no appeal was prosecuted to this Court.

countenances conduct contrary to Federal law. In the present case, the Court could enforce section 1 of the Louisiana Act, but could not enforce that part of section 2 relating to non-contractors if, under the circumstances, such enforcement would be contrary to the Sherman Act."

The fallacy of this reasoning lies in the fact as shown above that the enforcement of Section 2 of the Louisiana Act will not result in a Federal court of equity basing the exercise of its injunctive power upon grounds which are illegal because of the Sherman Act. As pointed out above, the immunization of contracts entered into under Section 1 of the Louisiana Act by the adoption by Congress of the Miller-Tydings Amendment leaves nothing in the case at bar to which the prohibitions of the Sherman Act might apply.

POINT II.

If it be assumed, contrary to the reasoning set forth in Point I, that it was necessary for Congress to exempt the "non-signer" provisions of the State statute from the provisions of the Sherman law, the legislative history and underlying purpose of the Miller-Tydings amendment establish that such amendment must be construed to have effected such exemption.

It has been shown in Point I that the only action required by Congress to make the State Act wholly effective, was the exemption of the contract between the manufacturer and retailer from the provisions of the Sherman Law. Nevertheless, it now will be shown that the Miller-Tydings Amendment must be construed to have intended to leave to the states the right to effectuate their own policy

with regard to their own affairs, and particularly the right to enjoin non-signing retailers from selling at less than the minimum price when notified of the contract between the wholesaler and the retailer.

Preliminarily, it may be pointed out that if it were held, as petitioners contend, that the amendment should be construed to exempt only the contracts between manufacturers and retailers, and that a further exemption is required to make Section 2 of the State Act effective, then the Miller-Tydings Act was a mere futile enactment. This petitioners admitted in their main brief below, for they state (p. 6):

> "It should be pointed out that a decision favorable to appellants will cripple, if it will not kill the Miller-Tydings Act. If the Miller-Tydings Act is limited, as the act itself says, to validating fair trade contracts but has no application to price-fixing imposed upon non-contracting parties, fair trade statutes will be deprived of effectiveness in transactions affecting interstate commerce."

That Congress knew of all the provisions of the State Acts and intended to make all such provisions wholly effective, appears from the Committee reports and statements on the floor of Congress. Nowhere is there the slightest intimation that Congress intended other than to validate *the entire plan* set forth in the State Statutes. On the contrary, it appears clearly that that was understood to be the effect of the Miller-Tydings Amendment.

In House Report No. 382, 75th Congress, 1st Session (March 11, 1937), the Committee on the Judiciary in reporting on the Bill, H. R. 1611, stated at page 2 thereof:

> "State fair trade acts typically provide, first, that contracts may lawfully be made which provide for

maintenance by contract of resale prices of branded or trade-marked competitive goods. *Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.*"

The Illinois statute, including the non-signer clause, is then quoted in full, with the statement that the statute was recently held constitutional in the *Old Dearborn* case.

At page 3 the Committee adds the following:

> "Your committee respectfully submit that sound public policy on the part of the Federal Government lies in the direction of lending assistance to the States to *effectuate their own public policy* with regard to their internal affairs. It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal Government."

In the Senate, the Committee on the District of Columbia, in reporting (Senate Report No. 879, 75th Congress, 1st Session July 6, 1937) on the Miller-Tydings amendment which the Committee added as a rider to the House Appropriations Bill, incorporated the report of the Committee on the Judiciary on the independent Tydings Bill (S. 100), and stated that this report was also applicable to the provisions of the Miller-Tydings Amendment. At page 6, in the report as incorporated, the Committee said:

> *"The Congress is not called upon to pass upon the effectiveness of the remedy, but it should not put obstacles in the way of efforts of the individual States to make the remedy effective.*

* * * * * *

"But most important, from the standpoint of the Congress, the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws.

"In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful."

The Minority Views which appear as Part 2 of the same Senate Report, No. 879, on page 3 thereof, incorporate a letter from the Chairman of the Federal Trade Commission addressed to the President under date of April 14, 1937, which letter the President had transmitted to the Senate on April 24, 1937 (81 Cong. Rec. 3838, Sen. Misc. Doc. No. 58). In that letter, the Chairman states, among other things, in commenting on S. 100:

"A peculiar feature of many of the State laws which would, under a recent decision of the Supreme Court, speaking through Mr. Justice Sutherland (57 S. Ct. 147), *thus** be made binding upon interstate commerce is that they require wholesalers and retailers to conform to the provisions of private resale price maintenance contracts to which they are not parties. Thus, a private contract, the provisions of which are determined without public hearing and apart from any public supervision as to reasonableness, is made binding upon all dealers and the consuming public."

When the Senate rider to the District of Columbia Appropriations Bill was debated in the House following the Conference Committee's Report, Representative McLaughlin referred to the deliberations of the Judiciary Committee, of which he was a member, on the similar January, 1937

* *i.e.*, By the enactment of the Miller-Tydings Amendment.

bill. He said that the Committee, prior to its favorable report on said bill, had considered and rejected certain objections thereto (81 Cong. Rec. 8142). He then stated:

> "However, in order to present the matter fully to the House, these objections should be referred to. These objections are:
>
> "First. That H. R. 1611, if enacted, would impose a penalty upon a seller of merchandise for selling such merchandise below the minimum price agreed upon in a contract to which he is not a party.
>
> • • • • • •
>
> "The objections were overruled by the committee after a consideration of the testimony bearing upon them and after full discussion of the objections.
>
> "The first objection, namely, that H. R. 1611, if enacted, *will permit resale contracts to be binding upon parties other than the parties to the contract itself*, is fully answered by the statement that *the respective State laws make provision that the contract shall be binding upon all those who sell the trade-marked article* which is the subject of the resale contract whenever the person selling the article below the contract resale price does so willfully and knowingly. This argument is *well answered by the controlling opinion of the Supreme Court of the United States in the case of Old Dearborn against Seagram, supra*, upholding the validity and constitutionality of the Illinois State Fair Trade Practice Act, * * *.
>
> • • • • • •
>
> "Further complete answer to this objection is that the respective States in the exercise of their wisdom and judgment imposed the penalties provided in the respective State acts. The bill before us today, if enacted, merely *makes effective the law*

> *which has been enacted by the respective State legislatures* to govern transactions within their own borders."

Finally, Senator Tydings, in speaking in favor of the Bill, said (81 Cong. Rec. 7496):

> "What we have attempted to do is what 42 states have already written on their statute books. It is simply to back up those acts, that is all; to have a code of fair trade practices written not by a national board such as the N. R. A. but by each State, so that the people may go to the State legislature and correct immediately any abuses that may develop."*

In the light of all of the foregoing, it is idle to argue, as do the petitioners, that Congress was not fully conversant with the provisions of the State Acts and specifically with the provisions of Section 2 which gave a remedy against a non-signer. *From the foregoing quotations it also appears that, having exempted the contract between the wholesaler and retailer from the provisions of the Sherman Law, the intention was to leave to the states the extent to which such exempted contract might be made operative against a non-signing retailer, who, with knowledge of the contract, nevertheless sold below the minimum price established thereby.*

Furthermore, it is obvious from the reports that the Congress was familiar with the decision in the *Old Dearborn* case, wherein the Court discussed at length the provisions with respect to the liability of a non-signer and found that that provision did not violate the "due process" or "equal protection" clauses of the Federal Constitution.

---

*For further evidence of Congressional knowledge that adoption of the Miller-Tydings Amendment would validate the State "non-signer" clauses, see statement of Senator King speaking in opposition to the rider to H. R. 7472 (81 Cong. Rec. 7491).

The petitioners argue that because the Miller-Tydings Amendment simply refers to "contracts or agreements prescribing minimum prices," the non-signer provision must be deemed still to be subject to the prohibitions contained in the Sherman Law. However, as shown, the statute and its history make evident that Congress intended to make the whole state law effective, and, as above stated, the petitioners concede that the construction they contend for would make the Amendment wholly futile. Hence, to impute to Congress the intent to make *only a part* of the statute effective, although that part is entirely dependent for its effective operation upon the rest of the statute, is to attribute to Congress an absurd and futile gesture.

The statutory rules of construction followed in this court indicate that the absence of an express validation of Section 2 is immaterial, provided it appears that the validation was essential to accomplish the underlying purpose of the act, namely, the making of the state statutes effective. The omission is immaterial for two reasons; (1) the intention of Congress being clear, that intention will be carried out; (2) the non-signing retailer and the consumer purchasing from him were not parties to any contract combination or conspiracy, and the Sherman Act, accordingly, could not have any relation to violation of the state statute by the non-assenter, and to the purchase from him by the ultimate consumer.

In *U. S.* vs. *American Trucking Associations, Inc.*, 310 U. S. 534, 543, this Court stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or*

> *futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."* (Citing many cases in footnotes.)

The policy which requires the Courts to give weight to the statutory purpose is particularly compelling where the purpose of a federal statute is to give express validity to a state enactment, even where the federal statute is not, as here, an enabling act. The policy was stated by this court as follows in *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85:

> "The rule applicable is clearly stated in *Illinois Central R. Co.* v. *Public Utilities Comm'n*, 245 U. S. 493, 510: 'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.' We have frequently applied that principle. See e. g. *Reid* v. *Colorado*, 187 U. S. 137, 148. *Missouri Pacific Ry. Co.* v. *Larabee Mills Co.*, 211 U. S. 612, 621, *et seq.* *Missouri, K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412, 418-419. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 139. *Northwestern Bell Tel. Co.* v. *Nebraska Ry. Comm'n*, 297 U. S. 471, 478. *Kelly* v. *Washington*, 302 U. S. 1, 10, *et seq.*"

From the foregoing it appears that there is no basis for the contention that Congress intended to exempt from the Sherman Law only section 1 of the State Statutes.

It should be added that there have no doubt been diverse views as to the wisdom and effectiveness of the State Fair

Trade Acts both before and since the enactment of the Miller-Tydings Amendment. But it is important to note that although fourteen years have elapsed since the enactment of that Amendment in 1937 and eighteen years have elapsed since the "non signer" provision first appeared in 1933 in the California Act not a single act has been repealed. Furthermore, the courts of last resort of every State (except Florida) where the question has arisen, have held the state acts constitutional.*

Finally, attention should be called to the following statement of this court in the *Old Dearborn* case:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. *True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies.* We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative

---

* In Florida, the first act was held unconstitutional because of insufficient title. *Bristol-Myers Co.* v. *Webb's Cut Rate Drug Co., Inc.*, 137 Fla. 508, 188 So. 91. The second act was held unconstitutional upon the ground that, although it was held by this Court that such acts did not contravene the Federal constitution, they did nevertheless violate the provisions of the Constitution of Florida as to which the State Court was the final arbiter. *Liquor Stores, Inc.* v. *Continental Distilling Corp.*, 40 So. 2d 371. A third act has been passed.

The decisions of the various State Courts are collected in *Sears* v. *Western Thrift Stores of Olympia*, 10 Wash. (2) 372, 380-86; 116 P. 2d 756, 760-63.

determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned" (299 U. S. at p. 195).

CONCLUSION.

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

SAMUEL I. ROSENMAN,
Attorney for The National Association of Retail Druggists and Bureau of Education on Fair Trade Inc., *Amici Curiae.*

SAMUEL I. ROSENMAN,
GODFREY GOLDMARK,
HERMAN S. WALLER,
ROBERT LOWENSTEIN,
of Counsel.

Appendix.

Statutes Involved.

A.

The pertinent provisions of the Louisiana Fair Trade Act (Act 13 of 1936, La. R. S. 51:391-396) are as follows:

> "Section 1. Be it enacted by the Legislature of Louisiana, That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract: * * *"
>
> "Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.
>
> "Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices."

* * *

B.

The Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, §1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) (amendment italicized):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.* Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."